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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 704

ST. REGIS PAPER CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–19a) is not yet reported. The opinion of the district court (App. 103a–114a)[1] is reported at 181 F. Supp. 862.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1960. The petition for a writ of certiorari was filed on February 7, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "App." refers to the Appendix to the Brief for the United States in the court of appeals, which has been filed with this Court.

STATEMENT

This case arose out of an investigation by the Federal Trade Commission of a series of acquisitions of paper products companies made by the petitioner St. Regis Paper Company, the third largest firm in the paper industry.[1] The purpose of the investigation was to determine whether the effect of the acquisitions may have been substantially to lessen competition or to tend to create a monopoly, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18 (see App. 10a–11a). The Commission began its inquiry on September 7, 1956, by requesting the petitioner voluntarily to submit information concerning its acquisitions made since 1954 (see App. 79a; Ex. 1).[2] After a year of unsuccessful efforts to obtain any substantial part of the information requested on a voluntary basis (App. 79a–82a), the Commission on September 16, 1957, issued a subpoena *duces tecum* calling for documents concerning those acquisitions and three others which had been consummated in the interim (see App. 84a; Ex. 13). The petitioner complied with this subpoena and submitted the subpoenaed documents (App. 84a–97a), which included retained copies of certain census reports (App. 95a–96a).

The Commission thereafter determined that it needed further information for its investigation, and requested voluntary submission of additional docu-

[1] See Standard & Poor's *Industry Surveys*, Sept. 22, 1960, P–8 (production rank). St. Regis has total assets of $450 million and its 1959 net sales amounted to $474 million. Moody's *Industrial Manual* 848–852 (1960).

[2] "Ex." refers to the exhibits to the Stipulation of Facts (App. 79a–102a) which have been certified and lodged with this Court.

ments (see App. 97a). There was considerable correspondence and discussion between the Commission and the petitioner with respect to this additional information, but only a small amount was supplied (App. 97a–99a).

In January 1959, the Commission instituted a formal investigation of the petitioner's acquisitions of paper companies since January, 1954 (App. 10a–11a). On January 9, 1959, it issued six orders which required the submission within 30 days of special reports providing specified information and documents relating to the acquisitions (App. 12a–52a). On June 8, 1959 the Commission broadened its investigation (App. 55a–56a), and issued three additional orders calling for special reports on two further acquisitions (App. 57a–68a).

When the petitioner failed substantially to comply, the Commission issued notices of default with respect to the nine special reports (App. 69a–74a). The effect of these notices was to start the running of the 30-day period after which, under Section 10 of the Federal Trade Commission Act (15 U.S.C. 50), the petitioner would be liable for a forfeiture of $100 per day for each day of default.

The nine orders contained 358 separate requests for information (Br. 40).[3] Prior to the Commission's issuance of the notices of default, the petitioner had answered 52 (15%) of these requests.

On September 15, 1959, approximately three weeks after the statutory penalties had begun to accrue pur-

[3] "Br. refers to the grey-covered brief of the United States in the court of appeals, which has been certified and lodged with this Court.

suant to the notice of default under the second group of orders (App. 72a–74a), the United States instituted a two-count civil action against the petitioner in the district court for the Southern District of New York (App. 2a–9a). The first count sought equitable relief in the nature of mandamus, under Section 9 of the Federal Trade Commission Act (15 U.S.C. 49), to compel the petitioner to comply with the orders directing it to file the special reports (App. 2a–6a). The second count sought recovery of the statutory forfeiture of $100 a day (App. 7a–9a).

As noted, prior to the defaults the petitioner had answered 52 of the 358 requests for information. It answered an additional 72 of them (20%) in a post-trial memorandum in the district court by referring to certain documents it had submitted both before and after the default date; and it answered another 33 requests (9%) for the first time in its post-trial memorandum (Br. 40). Thus, 201 of the requests had not been answered when the district court entered its final judgment.

The district court rejected the petitioner's contention that the Commission had no authority to utilize the special reports procedure of Section 6(b) of the Act as a means of obtaining information in an investigation under Section 7 of the Clayton Act (App. 105a–108a). It held, however, that 43 of the 358 requests for information (12%) were "vague and uncertain" (App. 110a; Br. 12, n. 23), and that the petitioner therefore need not respond to them (App. 112a–113a). The court required answers to the remaining 158 requests "which are enforceable and have not been an-

swered" (App. 112a–113a; Br. 40), including 21 requests (6%) covering retained copies of census reports (App. 108a; Br. 40). Finally, the district court rejected the government's claim for forfeitures. It ruled (App. 114a) that since the orders on which the forfeiture claims were based "are partially defective" and since it was enforcing "only * * * those portions of the orders which we find unobjectionable * * * the Government has no right to forfeitures under the circumstances."

Both parties appealed. The court of appeals upheld the district court's order insofar as it directed the petitioner to submit the special reports (including the furnishing of the retained copies of the census reports) (Pet. 7a–13a), but it reversed the district court insofar as the latter refused to award forfeitures. The court stated (Pet. 14a–15a) that this case involved no "such mitigating circumstances" as "a simple oversight or an honest mistake in a good-faith attempt to comply with the Commission's order." Here the petitioner "refused to accede to many of the Commission's requests for documents and information on the sole ground that the Commission had no authority to demand what was requested." The court further ruled (Pet. 18a) that petitioner could have directly challenged the order requiring the submission of the special reports under either the Declaratory Judgment Act or the Administrative Procedure Act, and that "the exaction of the statutory penalties for noncompliance is fair in any case in which the respondent awaits a mandamus action before contesting the agency's demands, and the order is held valid."

DISCUSSION

The petitioner challenges the decision below on three principal grounds.[4] It contends (1) that the Commission cannot use Section 6(b) of the Federal Trade Commission Act to investigate the legality of acquisitions under Section 7 of the Clayton Act; (2) that, in the circumstances of this case, the government had no right to civil penalties for the petitioner's refusal to comply with the orders directing submission of the special reports; and (3) that the Commission had no authority to obtain the petitioner's retained file copies of census reports.

The holding of the court below on the last issue, sustaining the Commission's power to obtain such copies, conflicts with the decision of the Court of Appeals for the Seventh Circuit in *Federal Trade Commission* v. *Dilger*, 276 F. 2d 739, certiorari denied, 364 U.S. 882. Since this question is important to the Federal Trade Commission, the Antitrust Division of the Department of Justice, and the Bureau of the Census,[5] we do not oppose certiorari on this issue (the fifth question presented in the petition). We submit, however, that the remaining questions presented do not call for further review.

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[4] The petitioner also questions whether, in view of the Expediting Act, the Government's appeal was properly taken to the court of appeals rather than directly to this Court (Pet. 9–11). We believe that the court of appeals' opinion (Pet. 4a–7a) fully and correctly disposes of this issue, and the parallel question involving its jurisdiction to hear the petitioner's appeal.

[5] See the petition for a writ of certiorari, pp. 14–15, and the memorandum for the Secretary of Commerce, in the *Dilger* case (No. 375, this Term).

1. Section 6(b) of the Federal Trade Commission Act (15 U.S.C. 46(b)) empowers the Commission to "require, by general or special orders, corporations engaged in commerce * * * to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing." We submit that *United States* v. *Morton Salt Co.*, 338 U.S. 632, fully sustains the power of the Commission to utilize its broad § 6(b) powers to obtain information relating to possible Clayton Act violations.

In *Morton Salt*, the Court upheld the power of the Commission to require special reports showing how a corporation had complied with a court of appeals' order enforcing a Commission order under Section 5 of the Federal Trade Commission Act directed against price-fixing. In rejecting the contention that "the reports set forth in § 6 can be required only 'in support of general economic surveys and not in aid of enforcement proceedings under * * * section 5'" (p. 649), the court stated (*ibid.*, emphasis added):

> While we find a good deal which would warrant our concluding that § 6 was framed with the pre-existing antitrust laws in mind, and in the expectation that the information procured

> would be chiefly useful in reports to the President, the Congress, or the Attorney General, *we find nothing that would deny its use for any purpose within the duties of the Commission,* including a § 5 proceeding. A construction of such an Act that would allow information to be obtained for only a part of a Commission's functions and would require the Commission to pursue the rest of its duties as if the information did not exist would be unusual, to say the least. The information was such as the Commission was authorized to obtain and we think it could be required for use in determining whether there had been proper compliance with the court's decree in a § 5 case.

If, as *Morton Salt* held, the Commission may use Section 6(b) to obtain information in connection with its "duties" under Section 5 of the Federal Trade Commission Act, it may certainly also do so in connection with its "duties" under the Clayton Act.* The petitioner offers no valid justification for its position that the Commission may utilize Section 6(b) for investigations only under Section 5 of the Trade Commission Act but not under Section 7 of the Clayton Act. Nothing in the broad language of Section 6(b) or, as the court of appeals pointed out (Pet. 9a–11a), in its legislative history, supports petitioner's narrow reading of the statute or its restrictive interpretation of *Morton Salt*—an interpre-

* Conduct that violates the antitrust laws also constitutes an unfair method of competition under Section 5 of the Trade Commission Act. *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 609; *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 395.

tation that is directly contrary to the Court's statement there that Section 6(b) may be used "for any purpose within the duties of the Commission."

2. Section 10 of the Act imposes a forfeiture of $100 a day upon any corporation which fails "to file any annual or special report * * * within the time fixed by the commission for filing the same * * *." In the instant case the district court held that 43 of the 358 requests (12%) were too vague to be enforced. The court, however, held that the 158 remaining requests that had not been answered were valid.[1] As the court of appeals pointed out (Pet. 14a), the petitioner's failure to answer these 158 requests was not the result of "a simple oversight or an honest mistake in a good-faith attempt to comply with the Commission's order," in which event the court indicated it would not have directed the forfeitures. For here the facts "suggest[ed] no such mitigating circumstances" (Pet. 14a), since many of the refusals to submit the information were rested "on the sole ground that the Commission had no authority to demand what was requested" (Pet. 15a). Indeed, the

[1] The petitioner's statements that the district court required it to comply with only one-third of the requests (Pet. 2, 15), and that it invalidated two-thirds of the questions (Pet. 7, 20), give a misleading picture of the facts. As we have shown (see the Statement, *supra*, p. 4), the district court held that 12% of the requests (43) were invalid for vagueness. It directed compliance with 158 requests, which were all the requests that had not been complied with. The reason the court did not direct compliance with the remaining requests was not, as the petitioner implies, because those requests were defective, but because they had already been complied with by the date of its judgment.

petitioner conceded, "[a]dmittedly, most of the questions were reasonably straightforward and were capable of being answered" (see Br. 16). In the circumstances, we submit that the court below correctly held that forfeitures should be awarded, since the fact that the petitioner's "recalcitrance was caused by a wrong guess on a disputed issue of law does not prevent it from being held to 'lawful consequences attached to the refusal' " (Pet. 15a).

The petitioner may not complain because the penalties were imposed in the same judicial proceeding in which the validity of the demands for information was contested and sustained. For, as the court of appeals correctly held (Pet. 16a–18a), the petitioner could have tested the validity of the order before incurring any statutory penalties by proceeding under either the Declaratory Judgment Act or the Administrative Procedure Act. Compare *United States* v. *Morton Salt Co.*, 338 U.S. 632, 654. The petitioner, however, never attempted to seek such immediate review of the orders, but instead elected to wait and contest their validity in a proceeding for their enforcement and for penalties for non-compliance. Plainly, the fact that the petitioner made a "wrong guess on a disputed issue of law" did not deny it due process of law when it was held to the "lawful consequences attached" (Pet. 15a). And, of course, the purpose of the statutory plan imposing a $100-a-day forfeiture for non-submission of reports is to "furnish sufficient inducement to compliance with requests for information" (*United States* v. *Clyde S.S. Co.*, 36 F. 2d 691, 694 (C.A. 2)).

Nor is there any merit to the petitioner's contention (Pet. 15–17) that, because the district court refused to order compliance with the 12% of the requests that were vague, the remainder of the requests, with which compliance was directed, ceased to be orders of the agency and became orders of the court, to which the statutory forfeitures are inapplicable. The various requests were severable. The small number held invalid were not so interrelated to, or dependent upon, the remaining requests as to make the orders directing their submission new orders, merely because they were enforced only in part. What the district court did here was, in substance, no different from what a court does in any case in which invalid but separate portions of an administrative order are eliminated, and the remaining valid part is then enforced.

Finally, there is no basis in the statute for the petitioner's argument (Pet. 17–20) that the forfeitures apply only to failure to submit "special reports," but not to failure to answer specific questions comprising portions of such reports. For, as the court below stated (Pet. 15a–16a), "[i]t would be totally unreasonable to withdraw from the Commission the coercive effect of the § 10 penalty whenever it makes its wants known in detail but permit it to use the threat of a mounting forfeiture so long as it cloaks the foci of inquiry behind general language."

CONCLUSION

We do not oppose the granting of the petition with respect to the fifth question presented. As to all other questions presented, however, the decision below is correct and no substantial question is presented; as to these questions the petition for a writ of certiorari should be denied.

Respectfully submitted.

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